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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

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RONALD N. SIMON,
Petitioner,

versus

JOHN COOK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND THE LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT,
Respondents.

◆ ◆ ◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FILED
Jun 06, 2008
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No. 06-6514
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD N. SIMON,
Plaintiff-Appellant,
v.
J. COOK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL.,
Defendants-Appellees.

ORDER

****

BEFORE: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and BELL, District Judge. FN 1.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green
Clerk

FN 1. Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

APPENDIX B

FILED
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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Filed: January 30, 2008
No. 06-6514
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD N. SIMON,
Plaintiff-Appellant,
v.
JOHN COOK, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and BELL, District Judge. FN 1.

FN 1. The Honorable Robert Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

BOGGS, Chief Judge. On October 31, 2003, Ronald Simon telephoned the Lexington Police Department to report that government officials had been harassing him. After two officers arrived at his house, Simon allegedly stated that the police and county coroner had been harassing him and that many agencies and government officials were implicated in the alleged harassment. Officer John Cook handcuffed Simon after Simon pointed his finger in Cook's face. Pursuant to Kentucky law, Officer Cook detained Simon and transported him to Eastern State Hospital (ESH) for a mental evaluation. A clinician diagnosed Simon with "psychotic disorder – not otherwise [*875] specified" and ordered him medicated and held for 72 hours. Simon brought a § 1983 suit against Officer Cook, individually and in his capacity as a police officer, and the Lexington-Fayette Urban County Government (LFUCG). Simon also challenged the constitutionality of the Kentucky statute and raised numerous state law claims. The district court held that Simon's constitutional rights had not been violated and granted summary judgment for Cook and the LFUCG. The court also rejected Simon's challenges to the statute itself. Simon appeals those holdings and appeals the district court's holding allowing discovery of his psychotherapist-patient communications. We affirm.

I

On October 31, 2003, around 4:30 p.m., Simon telephoned the Lexington Police Department to report "an incident of harassment." Specifically, Simon reported seeing a coroner's van behind him in

traffic for the second time in a week and stated that he felt that the coroner's van had been following him and that he "felt harassed by the coroner's van." Simon also told the dispatcher that he "had received ambiguous warnings over the previous two or three years from various anonymous people that may or may not have been threats against [his] life." Simone [sic] emphasized that he "did not know who was responsible for harassing [him] and that [he] had only vague and very reluctant suspicions that police officers might be involved."

Officer Gene Haynes was dispatched to Simon's home to take Simon's statement and arrived approximately ten minutes after Simon's call to the police. En route, Haynes remembered that Simon's address had been mentioned during a briefing sometime prior to October 31, checked his police computer, and saw that Simon's address was flagged as a "signal 10," meaning that officers were advised of a potential risk in their contact with citizens at that address. FN 2.

> FN 2. Later testimony indicated that an officer safety alert does not necessarily indicate that a person is mentally ill.

Haynes did not know the basis for the "signal 10" alert but requested dispatch of a second unit to Simon's address. When Haynes arrived, he and Simon began to converse on Simon's porch. According to Haynes's deposition, Simon stated that he felt he had been harassed, that the coroner had been following him, that such harassment may have been politically motivated, that the state police were

involved, and that then-congressman Ernie Fletcher was also involved. Haynes described Simon's appearance as "neatly dressed and well-groomed" and admitted that Simon displayed a "calm demeanor" and spoke rationally and coherently. Haynes also admitted that Simon was not violent or threatening at that time.

When Officer Cook arrived, he determined that the situation was non-violent and that Officer Haynes had the situation under control. Officer Cook stood at the foot of Simon's porch, approximately four or five feet from Simon. Officer Haynes asked Simon to repeat his story. Simon again repeated that he felt that he was being watched, that it was politically motivated, that the state police were involved, and that the Kentucky Attorney General's office was involved. Haynes recalled that Simon had mentioned being attacked while using a phone and while in his own house. Haynes later testified that such comments "did not seem like comments of a rational person at the time." According to Officer Cook, Simon said that the coroner's van was sending him the message that the police would put Simon in a "body bag." [*876] Officer Cook asked Simon if he had ever been diagnosed with a mental illness, if he was under the care of a physician, or if he had been prescribed any medication. Simon replied negatively.

Officer Cook told Simon that his allegations "sounded outlandish" and told Simon that if he felt there was a conspiracy against him, he should contact the FBI or the Attorney General's office. Simon stated that he had tried to call those authorities from a phone booth, but that three men in black had attacked him. Simon thought those men were LFUCG police officers. According to Officer

Cook, Simon said that he was going to begin following police officers himself to find out why they were harassing him. Simon later denied making such a statement and insisted that he only said "how would you like it if I followed you around." According to Haynes and Cook, Simon then began screaming and yelling and "stuck his finger in the close proximity of Officer Cook's face." Haynes felt that Simon's actions "could have been a threat." Simon disputes that he raised his voice or jabbed his finger at Cook, although he admits pointing his finger within approximately a foot of Cook's face. Officer Cook told Simon not to point at him, but, according to Cook, Simon continued to approach and jabbed his finger in Cook's face. Officer Cook stated that if he had not flinched away from Simon, Simon's finger would have struck his face. Simon maintains that he merely continued pointing his finger at Cook. Officer Cook handcuffed Simon's arms behind his back, emptied his pockets, and confined Simon in the back seat of his police cruiser.

Kentucky Revised Statutes § 202A.041 authorizes the warrantless arrest of an individual who appears to be mentally ill, under certain circumstances:

> Any peace officer who has reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained shall take the individual into custody and transport the individual without unnecessary delay to a hospital or psychiatric facility
>
> . . . .

KY. REV. STAT. ANN. § 202A.041(1). The statute

further states that "the peace officer shall provide written documentation which describes the behavior of the person which caused the peace officer to take the person into custody." *Ibid.* Within 18 hours, a qualified mental-health professional must determine whether the person meets the criteria for involuntary hospitalization as provided in Kentucky Revised Statutes §§ 202A.026, 202A.031, and other sections. *Ibid.* Elsewhere in chapter 202A, "danger" or "threat of danger" is defined as "substantial physical harm or threat of substantial physical harm upon self, family, or others . . . ." *Id.* § 202A.011(2). "Mentally ill person" is defined as "a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors." *Id.* § 202A.011(9).

LFUCG Division of Police General Order 88-3/D addresses "Arrest and Transportation of Hospitalized or Mentally Ill Persons" and reproduces the language and requirements of Section 202A.041. The regulations also incorporate the statutory definition of "mentally ill person." The fact that Officer Cook followed those regulations is not disputed.

Acting pursuant to Section 202A.041 and departmental regulations, Officer Cook documented the incident in a post-arrest complaint and transported Simon to ESH. [*877] The complaint stated that Simon was placed under "emergency detention" and was a "danger to himself and others." Officer Cook brought Simon into the hospital, gave

the hospital a copy of the Uniform Citation, and left.

ESH records show that Simon was admitted at 7:30 p.m. on October 31. A Dr. Goldstein examined Simon that evening. According to Goldstein's summary of her interview with Simon, Simon reported that while he was in a phone booth attempting to make a complaint about alleged police harassment, a car backed its exhaust pipe to the phone booth and tried to poison him with carbon monoxide. Simon also said that when he went to the emergency room for treatment for that poisoning, a police officer assaulted him. According to Dr. Goldstein, although Simon denied any past psychiatric hospitalizations, he had told other staff members at ESH that he had been to ESH one time before. Simon denied the facts reported in the Uniform Citation, but Goldstein concluded that Simon "does continue to have a fixed delusion about the police being out to get him and out to harass him." Goldstein was unable to reach either of the neighbors whose phone numbers Simon had provided.

Dr. Goldstein concluded that Simon "appears to be extremely paranoid but logical at times, although he does appear to be delusional of the police. He denies any suicidal or homicidal ideation, or auditory or visual hallucinations. His insight and judgment appears [sic] to be *severely impaired*." (emphasis added). Goldstein diagnosed Simon with "psychotic disorder, not otherwise specified" and placed him on a 72-hour hold "due to patient threats and harassment towards police and feeling extreme paranoia." Goldstein also concluded that "the patient is felt to be extremely dangerous to himself as well as being dangerous to other people." A Dr. Patel

concurred in placing Simon on 72-hour hold. Goldstein also ordered that Simon be medicated with Risperdal. A 72-hour emergency admission is authorized under Kentucky Revised Statutes § 202A.031. After 72 hours, other procedures for extending involuntary hospitalization must be followed. *See* KY. REV. STAT. ANN. § 202A.031(2). Although the record is ambiguous on this point, it appears that Simon was released after 72 hours. FN 3.

> FN 3. The hospital admission history states that Simon was placed on a 72-hour hold. However, Simon states in his brief to this court that he was held for five days. The magistrate judge, in a ruling, also stated that Simon was held for five days. Finally, the district court stated that Simon was not discharged until November 5, 2003, approximately five days after his admission. However, the district court stated in another ruling that Simon was held for 72 hours, and Simon himself wrote in a letter attached to an affidavit he submitted below that he was released from ESH after 72 hours. The Kentucky statutes authorize a 72-hour confinement, and Simon does not raise any claims or arguments that he was held beyond the authorized time. We therefore assume that Simon was held for 72 hours.

Simon filed his complaint on October 29, 2004.

In his complaint, Simon alleged that Officer Cook's conduct had violated his due process rights and his constitutional right to be free from unlawful searches and seizures and that chapter 202A of the Kentucky Revised Statutes was unconstitutional. Depositions, interrogatories, affidavits, and admissions were sought and included in the record. The district court adopted the magistrate judge's order allowing discovery of Simon's medical records from ESH. On motions for summary judgment, the district court held that no violation of Simon's constitutional rights had occurred; therefore, Cook enjoyed qualified immunity from suit, and there was no basis for relief against the LFUCG. The court further [*878] held that Simon's constitutional challenges to the Kentucky statute failed. The district court declined to exercise supplemental jurisdiction over Simon's state law claims and dismissed them without prejudice.

II

We "review[ ] de novo a district court's grant of summary judgment on qualified immunity grounds, 'because the determination of whether qualified immunity is applicable to an official's actions is a question of law.'" *See v. City of Elyria*, 502 F.3d 484, 490 (6th Cir. 2007) (quoting *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 532 (6th Cir. 2002)). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment has the burden of proof and must demonstrate that there is

no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In reviewing a decision on a motion for summary judgment, we view the factual evidence and draws all reasonable inferences in favor of the non-moving party. *City of Elyria*, 502 F.3d at 491.

A district court's ruling on a constitutional challenge to a statute is reviewed de novo. *United States v. Sawyers*, 409 F.3d 732, 735 (6th Cir. 2005).

We review de novo the district court's analysis of the contours of the psychotherapist-patient privilege. *United States v. Hayes*, 227 F.3d 578, 581 (6th Cir. 2000). However, we have also held that where privilege issues are discovery-related, we review for abuse of discretion. *See Toledo Edison Co. v. G A Techs., Inc.*, 847 F.2d 335, 341 (6th Cir.1988); *see also Schoffstall v. Henderson*, 223 F.3d 818, 822-23 (8th Cir. 2000) (reviewing for abuse of discretion a district court's discovery order regarding the plaintiff's mental evaluations); *but see Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006) (applying de novo review when "the particular discovery issue goes to the application of the . . . privilege"). Additional confusion stems from the fact that, becuase [sic] the issue of waiver of the psychotherapist-patient privilege has rarely been litigated in this circuit, the precise standard of review for that issue is unclear. *See Maday v. Public Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (holding that placing emotional state in issue waived the privilege, but not stating the standard of review being employed). In this case, Simon appeals

the district court's decision allowing discovery of his allegedly privileged communications; therefore, we review for abuse of discretion. We note that little hinges on the standard employed since a lower court abuses its discretion when it commits an error of law. *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006); *see Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007) (noting that abuse-of-discretion review of discovery order regarding plaintiff's mental evaluations included review for errors of law).

III

A. Claims Against Officer Cook

The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate [*879] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether qualified immunity is warranted, we employ a three-part test:

> The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in

light of the clearly established rights.

Tucker v. City of Richmond, 388 F.3d 216, 219 (6th Cir. 2004) (quotation marks omitted); *see Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The existence of qualified immunity is a legal question for the court unless there is a genuine issue of material fact regarding whether the defendant actually committed acts that would violate a clearly established right. *Black v. Parke*, 4 F.3d 442, 446-49 (6th Cir. 1993). In this case, we hold that Officer Cook did not violate Simon's constitutional rights. Accordingly, Cook is immune from suit.

1. Alleged Fourth Amendment Violation

The Fourth Amendment grants citizens the right to be free from unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *Gardenhire v. Schubert*, 205 F.3d 303, 312-13 (6th Cir. 2000). There is no question that Officer Cook "seized" Simon within the meaning of the Fourth Amendment when he handcuffed Simon and took him to ESH. In *Monday v. Oullette*, we joined several other circuits in holding that the "Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others." *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997); *accord Ahern v. O'Donnell*, 109 F.3d 809, 817 (1st Cir. 1997) (per curiam); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 401 (7th Cir. 1993); *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993); *Gooden v. Howard County, Md.*, 954 F.2d 960, 967-68 (4th Cir. 1992) (en banc); *Maag v. Wessler*, 960 F.2d 773, 776 (9th Cir.

1991). We have reiterated the probable cause standard each time the question has been presented to this court. *See Ziegler v. Aukerman*, ___ F.3d ___, No. 06-2618, 2008 WL 114855, at *4-*6 (6th Cir. Jan. 14, 2008); *Fisher v. Harden*, 398 F.3d 837, 842-43 (6th Cir. 2005); *Roberts v. Anderson*, 213 F. App'x 420, 427 (6th Cir. 2007)

In the *Monday* case, we analogized a dangerous mental condition to the role of criminal activity in traditional Fourth Amendment analysis and concluded that "a showing of probable cause in the mental health seizure context requires only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior." 118 F.3d at 1102 (quoting *Illinois v. Gates*, 462 U.S. 213, 245 n.13 (1983)). Moreover, we stated that "because 'probable cause is a fluid concept[,] turning on the assessment of probabilities in particular factual contexts,' courts evaluate the existence of probable cause from the perspective of a reasonable and objective person in the position of the seizing official." *Ibid.* (internal citation omitted). In *Monday*, officers responded to a call of a potential suicide after the plaintiff had called a psychological counseling hotline and stated that he was mixing alcohol with his prescription medication. 118 F.3d at 1101. [*880] After being admitted to plaintiff's living room, Officer Oullette observed that plaintiff was intoxicated and depressed. *Ibid.* Oullette asked the plaintiff if he had any pills, and the plaintiff produced a vial of Xanax pills from his shirt pocket. *Ibid.* Officer Oullette determined that at least twenty pills were missing, even though the prescription had been renewed just the day before. *Ibid.* Plaintiff refused to go to the hospital, told Oullette his ex-wife had the

missing pills, and continued drinking his beer. *Ibid.* Reviewing those facts, we held that officers had probable cause to believe that the plaintiff was suicidal and might hurt himself if not taken to a hospital.

By contrast, in *Fisher*, we held that officers lacked probable cause to believe that an elderly man, who had been hunting while sitting on railroad tracks, was suicidal or a danger when he had obeyed their commands to drop his rifle and had approached them in a normal manner. 398 F.3d at 843. The *Fisher* court emphasized that the officers had "never questioned Fisher to determine if he might be depressed and attempting to commit suicide" before placing him face down and handcuffing him. *Ibid.* Fisher had not done anything "that the officers considered to be suspicious or threatening," "he was never verbally threatening, abusive, or irrational," and "he did not make any statements about hurting himself or anyone else." *Ibid.*

Although the instant case presents a closer question than either *Fisher* or *Monday*, we hold that the undisputed facts indicate that Cook had probable cause to believe that Simon was a danger to himself or others. Officer Cook was aware of the "signal 10" officer safety alert. Unlike the officers in *Fisher*, Officer Cook questioned and observed Simon at length. Simon's allegations that the coroner was following him; that men in black, whom he speculated may have been police, had attacked him; that unknown persons had backed a car's tailpipe up to a phone booth Simon had been using in an effort to poison him with carbon monoxide; and that multiple government agencies were complicit in these actions were bizarre and improbable. Although we credit

Simon, and Haynes's favorable statements, that Simon did not initially seem dangerous, even Simon admits that the situation escalated during his conversation with Cook. Crediting Simon's version of events, he pointed a finger within a foot of Officer Cook's face and asked rhetorically, "how would you like it if I followed you around?" Thus, Simon intimated that he intended to follow police officers to see why they were allegedly following him. Officer Haynes testified that Simon's finger-pointing was threatening. Officer Cook flinched to avoid Simon's finger, grabbed Simon's wrist, and handcuffed him.

Taken together, the undisputed facts indicate that Simon demonstrated a high level of irrationality and a relatively low level of dangerousness. That is, his undisputed statements indicated that he believed that various government officials were harassing him and that the police had attacked him in the past. At the same time, mere finger-pointing presents a very low level of dangerousness. We understand that there is a difference between facts indicating mental illness and merely obstreperous behavior, and we are reluctant to set the bar for probable cause so low that the merely obnoxious are detained for mental evaluation. *Cf. Kerman v. City of New York*, 261 F.3d 229, 240-41 (2d Cir. 2001) (reversing grant of summary judgment for police officers where police stated that the plaintiff had been ranting and acting unstable, but where police had deliberately ignored an opportunity to consult the plaintiff's own doctor before detaining him for mental evaluation). [*881] However, that said, probable cause requires only a "probability or substantial chance" of dangerous behavior based on the circumstances of each case. Even if Simon did not present a substantial chance of

immediate danger to Cook, his stated intent to follow the police and get to the bottom of the alleged attacks against him indicated a substantial chance of irrational and dangerous behavior in the near future. While such a statement might not suffice on its own, we must view the statement in the context of Simon's apparently paranoid statements about the police. Thus, taken together, Simon's words and actions created probable cause to believe that Simon was mentally ill and dangerous. Moreover, the fact that Dr. Goldstein's conclusions dovetail with Officer Cook's conclusions is further evidence that Cook's judgment was objectively reasonable. FN 4.

> FN 4. Of course, *Monday* admonishes that "courts evaluate the existence of probable cause from the perspective of a reasonable and objective person *in the position of the seizing official.*" 118 F.3d at 1102 (internal citation omitted) (emphasis added). Accordingly, it is important to note that even if Goldstein had concluded that Simon was mentally healthy, that would not necessarily show a lack of probable cause. *See ibid.* ("a mental health seizure can rest upon probable cause even when the person seized *does not actually suffer from a dangerous mental condition*" (emphasis added)).

Given the existence of probable cause, Officer Cook's decision to detain Simon for a mental evaluation was not a constitutional violation.

2. Alleged Substantive Due Process Violation

Simon also claims that Officer Cook made false statements to the staff at ESH and that such conduct violated Simon's right to substantive due process. According to Simon, Dr. Goldstein showed Cook's handwritten statement to Simon, and the "statement falsely asserted that Simon had been a patient at ESH, had been diagnosed as mentally ill[,] and was not taking his prescribed medication." Simon acknowledges in his brief that he must show conduct that "shocks the conscience" in order to prevail on his substantive due process claim. *See United States v. Budd*, 496 F.3d 517, 529 (6th Cir. 2007). To shock the conscience, conduct must have been "so brutal and offensive that it did not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (quoted in *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998)).

In this case, Simon cannot demonstrate any "conscience-shocking" conduct. Dr. Goldstein noted in Simon's admission history that the written citation indicated that Simon had stated that he had been to ESH once before but that he didn't have mental problems. Goldstein also noted that Simon had told ESH staff that he had been to ESH one time before. Simon offered no evidence that Officer Cook made false statements regarding his mental illness or failure to take medications. Goldstein's report indicates that Simon himself may have said he previously had been treated at ESH. Even if Officer Cook had made false statements as Simon alleges, Dr. Goldstein made her own independent evaluation of Simon. Morever, [sic] the alleged false statements in this case are not so egregious as to "shock the

conscience."

Since Officer Cook did not violate Simon's constitutional rights, our inquiry is at an end. We hold that Cook is entitled to qualified immunity.

B. Claims Against the LFUCG

Because no constitutional violations occurred in this case, the LFUCG necessarily is not liable to Simon. *See, e.g.*, [*882] *Monday*, 118 F.3d at 1105; *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993). "If no constitutional violation by the individual defendant is established, the municipal defendants cannot be held liable under § 1983." *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding that a municipality can be liable under § 1983 only for an actual constitutional violation committed by individual official).

C. Constitutionality of Kentucky Revised Statutes Section 202A.041

1. Fourth Amendment

In addition to suing based on Officer Cook's conduct, Simon also challenges the constitutionally of warrantless mental evaluations. Simon requests that we "declare that the Fourth Amendment requires two separate and discrete determinations of probable cause," the first regarding detention and the second regarding mental evaluation. Simon also argues that the Kentucky statute is unconstitutional because it authorizes unreasonable searches. Both arguments fail.

As noted above, we have held that the Fourth Amendment requires a showing of probable cause before a person may be seized for mental evaluation. *Monday*, 118 F.3d at 1102. The *Monday* court held

that no right was violated when an officer had probable cause, and it certainly did not require a warrant. *See ibid.* Thus, so long as an officer has probable cause to believe that an individual is dangerous, a warrant is not required in this circuit for a mental-health seizure. Neither does any precedent suggest that a separate inquiry is required before a mental evaluation may begin. Indeed, we note that requiring a separate warrant for mental evaluation could introduce significant delay beyond what the statute presently requires. *See* KY. REV. STAT. ANN. § 202A.041(1) (requiring evaluation within eighteen hours of transport to a hospital or mental facility). Instead, logically, the probable cause to detain suffices to authorize a mental evaluation. Regarding Simon's challenge to the Kentucky statute, the *Monday* court's establishment of the probable cause standard itself is meant to ensure the reasonableness of any searches. Thus, Simon's arguments fail.

2. Void for Vagueness

Simon argues that the Kentucky statute authorizing mental-health evaluations is void for vagueness because it fails to provide a police officer "with precise standards to follow in determining whether an individual is dangerous as a result of mental illness." Appellant's Br. 16.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *see United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). An enactment is "void for vagueness" if it fails to establish standards for police that are sufficient to

guard against arbitrary deprivations of liberty. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). An ordinance may also be unconstitutionally vague if it fails "to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). "An enactment imposing criminal sanctions or reaching a substantial amount of constitutionally protected conduct may withstand facial constitutional scrutiny only if it incorporates a high level of definiteness." *Id.* at 557; [*883] *see Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Where a statute does not reach a substantial amount of constitutionally protected conduct, the statute is void "only if [it] is impermissibly vague in all its applications." *Belle Maer Harbor*, 170 F.3d at 557.

Unfortunately for Simon, Section 202A.041 seems particularly unsuited to a facial challenge to its alleged vagueness. First, although our precedents regarding facial challenges outside the First Amendment have been described as "inconsistent," *see Staley v. Jones*, 239 F.3d 769, 790 n.26 (6th Cir. 2001), it is clear that outside of certain contexts (including the First Amendment and abortion) facial challenges are normally rejected because a person to whom the statute may be constitutionally applied may not challenge the statute on behalf of third parties. *See Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that to mount a successful facial challenge outside of the First Amendment, a party must "establish that no set of circumstances exists under which the [statute] could

be valid"); *but see Warshak v. United States*, 490 F.3d 455, 477 (6th Cir. 2007) (rejecting application of *Salerno* and holding that "facial invalidation is justified where the statute, on its face, endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment"), *reh'g en banc granted and opinion vacated Warshak v. United States*, No. 06-4092 (6th Cir. Oct. 9, 2007) (order). Second, and more particular to this case, numerous court decisions have upheld the constitutionality of other statutes that are similar to the Kentucky statute. The fact that similarly phrased statutes allow police officers to detain an individual involuntarily if they have "reason to believe" or a "reasonable belief" that the individual is mentally ill and poses a danger to himself or others weighs heavily against Simon's facial challenge. *See S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 271 (4th Cir. 1998) (citing *Ahern*, 109 F.3d at 817; *Pino v. Higgs*, 75 F.3d 1461, 1468-69 (10th Cir. 1996); *Gooden*, 954 F.2d at 960).

Simon's attempts to bolster his facial challenge are unpersuasive. First, Simon characterizes Section 202A.041 as a criminal sanction. It may be true that criminal sanctions are more susceptible to facial challenges for vagueness. *See Morales*, 527 U.S. at 55 n.22 (declining to apply *Salerno* and stating that even if the First Amendment is not implicated, where "vagueness permeates the ordinance, a facial challenge is appropriate"). Even so, Section 202A.041 clearly does not impose criminal sanctions. Second, although Simon argues separately that the statute violates First Amendment overbreadth doctrine, his vagueness argument does not implicate the First

Amendment. Third, Simon argues that a facial challenge is appropriate because Section 202A.041 reaches substantial constitutionally protected conduct. *See Belle Maer Harbor*, 170 F.3d at 557. However, *Belle Maer* reiterated that "vagueness claims not involving First Amendment freedoms must be examined in light of the facts of the particular case at hand and not as to the statute's facial validity." *Ibid.* Therefore, since the statute does not impose criminal penalties and Simon's vagueness challenge does not arise from the First Amendment, a facial challenge is inappropriate, and Simon may only challenge the statute as it was applied to him.

As applied to Simon, the definitions of dangerousness and mentally ill person included in chapter 202A are not sufficiently vague as to raise concerns about arbitrary enforcement. "Danger" means "substantial physical harm or threat of substantial physical harm upon self, family, or others . . . ." KY. REV. STAT. ANN. § 202.011(2). "Mentally ill person" means a person with [*884] "substantially impaired capacity to use self-control, judgment, or discretion . . . ." KY. REV. STAT. ANN. § 202.011(9). These definitions suffice to prevent arbitrary enforcement and did not give unlimited discretion to Officer Cook. Simon argues the statute is too vague because it does not require an explicit connection between the individual's mental illness and the individual's dangerousness. This argument is meritless, as the statute does require that Cook reasonably believed that Simon was both dangerous and mentally ill. We hold that Cook's belief was reasonable; therefore, as applied to Simon, the statute's conjunction of danger and mental illness is

sufficiently definite.

3. Overbreadth

On appeal, Simon argues for the first time that Section 202A.041 is unconstitutionally overbroad, in violation of the First Amendment. Because this claim was not raised below, this court is not required to consider it. "Generally, an appellant cannot raise a claim before the appellate court that was not raised below." *United States v. Cline*, 362 F.3d 343, 348 (6th Cir. 2004). As the *Monday* court itself stated, when a claim was not raised before the district court, and the district court never addressed it, plaintiff "has waived this argument and we will not review it." 118 F.3d at 1105.

4. Procedural Due Process

Simon next argues that Section 202A.041 is unconstitutional because it does not require the hospital to retain the officer's written documentation of the reasons why the individual is being detained for a mental evaluation. The statute merely requires that the "peace officer shall provide written documentation which describes the behavior of the person which caused the peace officer to take the person into custody." KY. REV. STAT. ANN. § 202A.041(1). Simon argues that this enables officers to evade allegations that they have submitted false statements, as Simon alleges Officer Cook did in this case. We disagree that due process requires retention of officers' citations.

In the context of involuntary commitment, the Supreme Court has "recognized that for the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection." *Vitek*, 445 U.S. at 491-92 (internal quotation marks and citations

omitted); *see also Noble v. Schmitt*, 87 F.3d 157, 161 (6th Cir. 1996) ("Involuntary commitment to a mental institution substantially restricts individual liberty in many respects."). Accordingly, the Court has held that a "State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself . . . ." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). Accordingly, state laws have been interpreted to require a finding of dangerousness before an individual can be committed. *See, e.g., Glass*, 984 F.2d at 57.

The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. To determine the process due, courts look at three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; [*885] and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Applying *Mathews* to the question of the burden of proof required for involuntary civil commitment, the Supreme Court has noted that it "is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual." *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). The Court also noted that the "state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Id.* at 426. Addressing the rights of prisoners involuntarily transferred to mental facilities, the Supreme Court approved of a district court's requirement that prisoners be provided written notice of the transfer, a hearing, opportunity at the hearing to present testimony of witnesses, an independent decisionmaker, a written statement as to the evidence relied upon and reasons for transfer to mental hospital, legal counsel, and effective notice of the foregoing rights. *Vitek*, 445 U.S. at 494-95; *see also Doe ex rel. Doe v. Austin*, 848 F.2d 1386, 1393-94 (6th Cir. 1988) (taking *Vitek* as guidance in identifying procedures required for involuntary commitment of mentally retarded adults). FN 5.

> FN 5. In approving of the requirements formulated by the district court, the Supreme Court did not hold that those requirements were mandatory. The Court merely said that the district

court's list of requirements sufficed under *Mathews* to meet the needs of due process. *Vitek*, 445 U.S. at 494-95.

Simon's claim is not that the entire chapter 202A scheme fails to provide due process. Rather, he argues simply that due process requires that written documentation from the officer be retained. This argument is also unpersuasive. Importantly, upon presentment of the allegedly mentally ill individual, the physician makes her own independent evaluation of the patient. In this case, Dr. Goldstein noted that she had reviewed the Uniform Citation and Adult Case Summary provided by the police, but as the district court found, "her evaluation was done independently from what the police do and her decision was based on Simon's mental status at the time of his evaluation." The statute is quite clear that, "[i]f after evaluation, the qualified mental health professional finds that the person does not meet the criteria for involuntary hospitalization, the person shall be released *immediately* . . . ." KY. REV. STAT. ANN. § 202A.041(1) (emphasis added). Since the doctor's evaluations are independent, retaining an officer's citation adds little or nothing to the process of admitting someone involuntarily.

Moreover, the retention of an officer's citation has no bearing on the constitutional adequacy of the qualified mental-health professional's independent examination. As the Second Circuit has stated, "due process does demand that the decision to order an involuntary emergency commitment be made in accordance with a standard that promises some reasonable degree of accuracy." *Rodriguez v. City of New York*, 72 F.3d 1051, 1062 (2d Cir. 1995).

However, Simon is not challenging Kentucky's standard for involuntary emergency commitment, and the retention of an officer's citation has no bearing on the adequacy of that standard or its application. We note that under [*886] Section 202A.041, allegedly mentally ill individuals receive all of the due process protections the Supreme Court approved in *Vitek*, except for legal counsel and the opportunity to call witnesses to contest the initial involuntary hospitalization. The omission of legal counsel and the right to call witnesses makes sense since the decision to hospitalize is being made in response to an immediate presentment of an individual and is only going to last 72 hours. Additional procedures, the adequacy of which Simon does not challenge, are required following the initial decision to hold an individual for 72 hours. *See* KY. REV. STAT. ANN. §§ 202A.031(2), 202A.051.

Thus, even though individuals have a strong interest in not being erroneously committed, there is almost no added value to requiring retention of officer citations as part of the process for 72-hour emergency commitment. Moreover, retaining such reports has no bearing on Kentucky's standards, which Simon does not challenge, for involuntary emergency commitment. Therefore, we hold that the statute's failure to require retention of an officer's citation is not a constitutional defect.

D. Psychotherapist-Patient Privilege

Finally, Simon claims that the district court's decision to allow discovery of his psychotherapist-patient communications violated the attendant privilege. The district court adopted the magistrate judge's ruling that, because Simon had placed his mental health in issue, he had waived the privilege.

The district court also ordered that any confidential records be placed under seal.

The Supreme Court has recognized a federal-common-law psychotherapist-patient privilege, holding that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). The Court also noted that, "[l]ike other testimonial privileges, the patient may of course waive the protection." *Id.* at 15 n.14. The Court did not say explicitly, however, whether the privilege is waived if a plaintiff puts his mental health at issue. However, this circuit has held that placing one's mental health at issue constitutes waiver of the privilege. *See Maday*, 480 F.3d at 821 (holding privilege waived when plaintiff sought mental-health damages); *see also Schoffstall*, 223 F.3d at 823 ("a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue").

In this case, it is undisputed that the privilege attached to Simon's communications with Dr. Goldstein. However, the privilege was waived. Simon's case against Officer Cook and the LFUCG hinges on whether Cook acted with probable cause when he detained Simon. That determination, in turn, depends on whether Cook had probable cause to believe that Simon was mentally ill and dangerous. Clearly, Simon's case placed his mental state at issue. Although only Cook's impressions are part of the probable cause inquiry, not Dr. Goldstein's later conclusions, Dr. Goldstein's later communications from Simon may inform our analysis of whether Cook's view of Simon's mental

state on the day of his detention was objectively reasonable. Therefore, Simon's suit waived the privilege.

IV

Therefore, for the reasons set out above, we AFFIRM the district court's grant of summary judgment.

APPENDIX C

Eastern District of Kentucky
FILED
NOV 07 2006
At Lexington
Leslie G Whitmer
Clerk U S District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-489-KSF

RONALD N. SIMON
PLAINTIFF
V.
J. COOK, individually and in his
official capacity, and
LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT
DEFENDANTS

SUMMARY JUDGMENT

****

In accordance with the opinion and order entered contemporaneously with this judgment, the Court HEREBY ORDERS AND ADJUDGES that:

(1) summary judgment is entered in favor of the defendants;

(2) the plaintiff's federal claims are DISMISSED WITH PREJUDICE and the plaintiff's state-law claims are DISMISSED WITHOUT PREJUDICE;

(3) this judgment is final and appealable and no just cause for delay exists; and

(4) this matter is STRICKEN from the active docket.

This the [7th] day of November, 2006.

/s/ KSF

KARL S. FORESTER, SENIOR JUDGE

APPENDIX D

Eastern District of Kentucky
FILED
NOV 07 2006
At Lexington
Leslie G Whitmer
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
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CIVIL ACTION NO. 04-489-KSF

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LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
DEFENDANTS

OPINION & ORDER

****

[Forester, U.S. District Court Judge.] This matter is before the Court upon the parties' cross motions for summary judgment. [DE #76 and #77]. These motions have been fully briefed and are ripe for review.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of an incident that occurred on October 31, 2003. The undisputed facts reveal the following. At approximately 4:30 p.m. on October 31, 2003, the plaintiff, Ronald N. Simon, telephoned the Lexington Police Department headquarters to report a perceived incident of harassment. [DE #77, Ex B] Specifically, Simon reported seeing a coroner's van behind him in traffic for the second time in a week. He also reported that he had received ambiguous warnings over the previous few years from various anonymous people indicating there may be threats against his life. Simon further reported that he had a vague and reluctant suspicion that police officers might be involved in this harassment. Based on his report, Simon was advised that a police officer would be dispatched to his house to take his complaint. [*2]

Lexington Police Officer Gene Haynes arrived at Simon's residence approximately ten minutes later. Simon joined Officer Haynes on his front porch and repeated his report of harassment to Officer Haynes. When Officer Haynes asked Simon who was responsible for the harassment, Simon speculated that it was politically motivated and that it might involve individuals affiliated with several public safety organizations. Officer Haynes suggested that Simon report the alleged harassment to the Kentucky State Police or to the Attorney General; however, Simon insisted that Officer Haynes make a written record of his allegations.

At that time, the defendant, Lexington Police Officer John Cook, arrived at Simon's residence.

Officer Haynes directed Simon to repeat his allegations to Officer Cook, who stood at the bottom of Simon's front porch steps. When Officer Cook asked Simon why the coroner's van would be following him, Simon responded that a small group of rogue police officers may be responsible, for the following reasons: (1) to bully him., or for a joke; (2) because Simon was suspected of a crime and they were engaged in overzealous surveillance designed to intimidate him; (3) for political reasons; (4) in retaliation for complaints Simon made to Internal Affairs several years earlier regarding an officer who allegedly assaulted Simon in a hospital emergency room; or (5) to make an actual threat against his life. [DE #77, Ex B]

When Officer Cook indicated that he could not take a report against another police officer, the conversation escalated. While Simon and the officers disagree about what happened next, Simon admits pointing his finger at Officer Cook. [DE #77, Ex B] Officer Cook has testified that he instructed Simon not to point at him, but that Simon smiled and then attempted to poke him in the face. [DE #77, Ex C] At that time, Simon was handcuffed and transported to Eastern State Hospital for a mental health evaluation pursuant to K.R.S. § 202A.04 1. [DE #77, Ex B] Simon was evaluated [*3] at Eastern State Hospital by Dr. Felissa Goldstein, who personally interviewed and examined Simon and determined that he was extremely dangerous to himself as well as being dangerous to other people. Dr. Goldstein, in consultation with an attending physician, placed Simon on a 72-hour hold. [DE #76, Ex H and I]

This action subsequently ensued. Simon filed his Complaint on October 29, 2004, pursuant to 42

U.S.C. § 1983 and other federal statutes, against the defendants, Officer Cook, individually and in his official capacity as a police officer employed by the Lexington-Fayette Urban County Government, and the Lexington-Fayette Urban County Government (hereinafter "LFUCG") for alleged violations of his constitutional rights. Simon's Complaint also asserts various state law claims. Simon seeks injunctive relief and monetary damages. [DE #1]

II. SIMON'S MOTION FOR SUMMARY JUDGMENT

In support of his motion for summary judgment, Simon first argues that he was seized in violation of the Fourth Amendment of the Constitution. As a result, Simon contends that Officer Cook is not entitled to qualified immunity, and that Cook and the LFUCG, under *respondeat superior*, are liable for damages, including punitive damages for false imprisonment under Kentucky state tort law. Second, Simon argues that K.R.S. 202A.041 and the Lexington Police Department's policy which implements the statute violate the Fourth Amendment, the procedural and substantive due process protections of the Fourteenth Amendment, and other constitutional rights. Simon's motion also seeks summary judgment on the alleged state-law claims for violations of state statutes and constitutional provisions.

III. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment first argues that Officer Cook is entitled to [*4] qualified immunity because Simon cannot prove that any of his constitutionally protected rights were violated by Officer Cook. Next, the defendants argue that Simon's claims against the LFUCG and Officer Cook in his official capacity must fail because Simon cannot show an unconstitutional governmental policy or custom which caused his injury and, therefore, the government is entitled to sovereign immunity on these claims. To the extent that Simon alleges conspiracy violations of 42 U.S.C. §§ 1985 and 1986, the defendants contend that Simon has failed to state a claim under either statute. Finally, with regard to Simon's state law claims, the defendants argue that Simon has no cause of action under the Kentucky Civil Rights Statute, K.R.S. Chapter 344, that Officer Cook is entitled to qualified immunity on the state law claims, and that Officer Cook and the LFUCG are entitled to sovereign immunity on the state law claims.

IV. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

ajudgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. [*5] 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

B. K.R.S. § 202A.041 AND RELEVANT LEXINGTON POLICE DEPARTMENT POLICY

Officer Cook seized Simon pursuant to Kentucky Revised Statute § 202A.041, entitled "Warrantless arrest and subsequent proceedings," which provides in pertinent part:

> (1) Any peace officer who has reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained shall take the individual into custody and transport the individual without unnecessary delay to a hospital or psychiatric facility designated by the cabinet for the purpose of an evaluation to be conducted by a qualified mental health professional. Upon transport of the person to the hospital or psychiatric facility, the peace officer shall provide written documentation which describes the behavior of the person which caused the peace officer to take the person into custody. If, after evaluation, the qualified mental health professional finds that the person does not meet the criteria for involuntary hospitalization, the person shall be released immediately and transported back to the person's home county by an appropriate means of transportation as provided in KRS 202A. 101. If, after

> evaluation, the qualified mental health professional finds that the person meets the criteria for involuntary hospitalization, appropriate proceedings under this chapter shall be initiated. The person may be held pending certification by a qualified mental health professional and implementation of procedures as provided in KRS 202A.028, [*6] 202A.031, or 202A.051 not to exceed eighteen (18) hours.

The Lexington Police Department has developed its General Order 88-3/D, which outlines its policy and procedure for handling prisoners when they require medical treatment and/or psychiatric evaluation. [DE #76, Ex L] It requires that when the officer "has reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained," the officer shall:

a. Take the individual into custody
b. Transport the individual without unnecessary delay to Eastern State Hospital (ESH) for evaluation by mental health professionals and
c. Provide ESH with written documentation of the individual's behavior evidencing danger or threat of danger in the POST-ARREST COMPLAINT BLOCK of the Uniform Citation. The Uniform Citation Adult Risk Form and front page of the Complaint and Offense Report may be copied for ESH use. . . .

LFUCG Division of Police General Order 88-3/D. Pursuant to the Kentucky statute and LFUCG policy, Officer Cook transported Simon to Eastern State Hospital where he was evaluated by a qualified mental health professional. [DE #76, Ex I] Based on this evaluation, Simon was involuntarily committed to Eastern State Hospital pursuant to Kentucky Revised Statute § 202A.031, which provides:

> (1) An authorized staff physician may order the admission of any person who is present at, or is presented at, a hospital. For the purposes of this subsection only, a hospital may include any acute care hospital that is licensed by the Commonwealth. Within twenty-four (24) hours (excluding weekends and holidays) of the admission under this section, the authorized staff physician ordering the admission of the individual shall certify in the record of the individual that in his opinion the individual should be involuntarily hospitalized.
>
> (2) Any individual who has been admitted to a hospital under subsection (1) of this section shall be released from the hospital within seventy-two (72) hours (excluding weekends and holidays) unless further detained under the applicable provisions of this chapter. [*7]

K.R.S. § 202A.031. Simon was ultimately discharged from Eastern State Hospital on November 5, 2003. [DE #77, Ex I]

C. OFFICER COOK IS ENTITLED TO QUALIFIED IMMUNITY ON SIMON'S FEDERAL CLAIMS

To prevail on a 42 U.S.C. § 1983 claim, a plaintiff "must establish that a person acting under color of state law deprived [him] of a right secured by the Constitution or the laws of the United States." *Waters v. City of Morristown*, 242 F.3d 353, 358-59 (6th Cir. 2001); *see also Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005). Simon alleges that his seizure pursuant to K.R.S. §202A.041 was in violation of the Fourth Amendment and other constitutional rights.

"Qualified immunity is a government official's 'entitlement not to stand trial or face the other burdens of litigation.' " *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). It is a defense designed to aid the effective functioning of government, namely by recognizing that police officers may err but that "it is better to risk some error and possible injury from such error than not to decide or act at all." *Dunigan v. Noble*, 390 F.3d 486, 490-91 (6th Cir. 2004) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). Accordingly, the central purpose of qualified immunity is to protect officers "from undue interference with their duties and from potentially disabling threats of liability." *Sample v. Bailey*, 409 F.3d 689, 695 (6th Cir. 2005).

There are two steps in the qualified immunity analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In the initial inquiry, the court must consider "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right." *Id.* If the facts, as alleged by the claimant, fail to establish a [*8] constitutional violation, then immunity applies. On the other hand, if the alleged facts sufficiently demonstrate a constitutional violation, the court must determine "whether the right was clearly established." *Id.* FN. 1

> FN. 1 As explained in *Causey v. City of Bay City*, 442 F. 3d 524 (6th Cir. 2006), panels of the Sixth Circuit Court of Appeals occasionally employ a three-step qualified immunity analysis; however both the two-step approach and three-step approach can be said to capture the holding of *Saucier*. *Compare Dunigan v. Noble*, 390 F. 3d 486, 491 n.6 (two-step approach) *with Sample v. Bailey*, 409 F. 3d 689, 696 n.3 (6th Cir. 2005) (three-step approach). Because the court finds no constitutional violation occurred at the first step of either test, it is unnecessary to address the second and third steps of the analysis.

In this case, Simon is unable to show a violation of any constitutionally protected right. Simon argues that Officer Cook violated his Fourth Amendment rights when he arrested him without a

warrant or court order. This Court has already held that the Constitution does not require a court order or warrant before an officer may seize an individual pursuant to K.R.S. §202A.041. [DE #91] Instead, the statute and Constitution only require that the officer have probable cause to believe the individual is mentally ill and dangerous to himself or others. If probable cause exists, the individual may be detained for a psychiatric evaluation. *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997).

A showing of "probable cause" in the mental health seizure context requires only a "probability or substantial chance" of dangerous behavior, not an actual showing of such behavior. *Monday*, 118 F.3d at 1102 (citing *Illinois v. Gates*, 462 U.S. 213,245 n. 13 (1983)). "Just as actual innocence will not render invalid an arrest that is properly based upon probable cause that criminal activity was occurring, a mental health seizure can rest upon probable cause even when the person seized does not actually suffer from a dangerous mental condition." *Fisher v. Harden*, 398 F.3d 837, 843 (6th Cir. 2005). The existence of probable cause is to be evaluated from the perspective of a [*9] reasonable and objective person in the position of the seizing official. "If the circumstances, viewed objectively, support finding of probable cause, [then] the arresting officer's actual motives are irrelevant." *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988).

A review of the undisputed facts reveals that Officer Cook had probable cause to believe Simon was mentally ill and dangerous. Officer Cook responded to a dispatch concerning an individual that, as Officer Cook was aware, had been designated an "officer safety alert" as a result of a

previous incident wherein Simon followed and confronted another police officer. [DE #76, Ex D] On arrival, Officer Cook began questioning Simon, who related bizarre and improbable allegations of harassment by various public safety organizations, including being followed by the coroner's van, and being gassed in a telephone booth by men dressed in black whom he believed to be police officers. Simon indicated his intent to continue to follow police officers and the coroner. [DE #77, Ex C] As their conversation escalated, Simon admits pointing a finger at Officer Cook. [DE# 76, Ex F] While Simon disputes any instruction from Officer Cook to refrain from pointing or making any attempt to jab or assault Officer Cook with his finger, Officer Cook has testified that he instructed Simon not to point at him. [DE #77, Ex C] Officer Cook has further testified that despite this instruction, Simon smiled and Officer Cook determined that Simon intended to poke him in the face. [DE #77, Ex C] Officer Haynes, who was also on the front porch at this time, testified that Simon "stuck his finger in [Officer Cook's] face and began to scream." [DE #77, Ex G] Both officers reasonably perceived a threat by the actions taken by Simon and had probable cause to believe that Simon was mentally ill and dangerous. Based on these facts, the Court finds that Simon has not established a violation of his Fourth Amendment rights with regard to the mental health seizure. [*10]

Although Simon also alleges that Officer Cook also violated his Fourth Amendment rights when he was patted down after his arrest, the law is clear that an officer may legally make a warrantless search incident to a lawful arrest. *United States v.*

Edwards, 415 U.S. 800 (1974). Thus, Simon's Fourth Amendment claim based on the pat down also fails.

Next, Simon contends that Officer Cook made false statements to the physician at Eastern State Hospital that he had been diagnosed as mentally ill, had been a patient at Eastern State Hospital before, and had not been taking his prescribed medication. He also contends that the Uniform Citation that Officer Cook testified he provided to Eastern State Hospital is not part of his medical records despite the requirement of K.R.S. § 202A.041 that written documentation be provided to the facility. However, Dr. Goldstein has testified that she indeed reviewed the Uniform Citation which was provided to her by Officer Cook. Moreover, her evaluation was done independently from what the police do and her decision was based on Simon's mental status at the time of his evaluation. [DE #76, Ex I] Simon cites no authority for the proposition that the alleged false statements or the fact that the Uniform Citation was not made a part of his medical records amounts to a constitutional violation, and the Court finds no grounds for finding that a constitutional violation occurred.

With regard to Simon's claim that Officer Cook violated his procedural due process rights by seizing him for a mental health evaluation, Simon merely presents the Court with rhetorical questions about the requirements under the Fourteenth Amendment with no factual or legal authority to support his claim. Similarly, with regard to his substantive due process claim, Simon fails to provide any factual support for his claim, and simply argues that an interest of privacy may be enforced under the substantive due process component of the Fourteenth

Amendment. To the extent that Simon attempts to argue that K.R.S. § 202A.041 violate his due process rights because it does [*11] not require a court order or a warrant before a law enforcement office may seize an individual for a mental health evaluation, the Court has already ruled that no such court order or warrant is required. [DE #91] Finally, to the extent that Simon alleges that the defendants conspired to violate his constitutional rights under 42 U.S.C. §§ 1985 and 1986, his claim must fail. Other than the bare allegations contained in his Complaint, Simon has come forward with no proof that the LFUCG and/or Officer Cook conspired to deprive him of his civil rights.

In conclusion, Simon has failed to establish that Officer Cook violated any of his constitutional rights as a result of the incident which occurred on October 31, 2003. Accordingly, Officer Cook is entitled to qualified immunity for all of the constitutional claims asserted by Simon.

C. SIMON'S CONSTITUTIONAL CLAIMS AGAINST OFFICER COOK IN HIS OFFICIAL CAPACITY AND THE LFUCG MUST BE DISMISSED

The Court now turns to Simon's claims against Officer Cook in his official capacity as well as the claims against the LFUCG for its alleged failure to instruct, supervise, control and discipline Officer Cook under § 1983. The claims against Officer Cook in his official capacity are equivalent to claims brought against the governmental entity which they represent. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Kentucky v. Graham*, 473 U.S. 159, 165-66

(1985); *Matthew v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). In order to recover against the government, Simon must show that the alleged violation of his civil rights occurred pursuant to and as a direct result of official LFUCG policy or custom. *Monell v. Department of Social Services, City of New York*, 436 U.S. 658 (1978); *Matthew*, 35 F.3d at 1049. The government cannot be held liable under a theory of *respondeat superior*. *Monell*, 436 U.S. at 691. For the LFUCG to be held liable, there must be a direct causal connection between an unconstitutional policy or custom and Simon's alleged injuries. *City of* [*12] *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985); *Johnson v. Hardin County, Kentucky*, 908 F.2d 1280, 1285 (6th Cir. 1990).

Essentially, Simon contends that the LFUCG "implicitly or explicitly adopted an official policy or custom which allowed police officers to involuntarily commit citizens for psychiatric evaluation without just cause." However, Simon is unable to come forward with any evidence that the LFUCG follows that alleged policy. Instead, the evidence reveals that the LFUCG Division of Police General Order 88-3/D allows an officer to detain an individual for a psychiatric evaluation only when the officer has "reasonable grounds to believe that an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained." [DE #76, Ex L] This policy is based on K.R.S. § 202A.041 and is consistent with all precedential case law. This Court has already held that the statute and policy are not unconstitutional. [DE #91]

Simon also attempts to argue that the LFUCG failed to train its employees. However, he has not alleged facts sufficient to state a claim under § 1983.

In order to succeed on a claim for failure to train, Simon must show that this failure to train amounts to deliberate indifference to the rights of individuals whom the employees come into contact with. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-86 (1989). Simon must show prior instances of unconstitutional conduct demonstrating that the LFUCG "has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher*, 398 F3d at 849. In other words, to show deliberate indifference, Simon must come forth with evidence that the LFUCG disregarded a known or obvious consequence of its action. *Id.* Simon cannot meet his burden.

The evidence reveals that LFUCG police officers receive training on issues including mental illnesses and probable cause, and specifically on seizures of mentally ill individuals pursuant to [*13] K.R.S. § 202A.041. [DE #76, Ex M and N] Simon has come forward with no evidence from which a reasonable jury could find that the LFUCG was deliberately indifferent to the training of its officers or that such failure to train was causally related to his alleged injuries. Additionally, Simon has failed to come forward with any evidence that the LFUCG has a history of abuse or that it disregarded a known or obvious consequence of its actions. Accordingly, Simon cannot succeed on his claim based on failure to train.

Moreover, for the LFUCG to be liable, a constitutional violation must take place. *Monnell* [sic],436 U.S. at 691. "If no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under § 1983." *Watkins v. City of Battle Creek*, 273 F.3d 682,

687 (6th Cir. 2001). Because Simon's allegations against Officer Cook failed to establish a constitutional violation, his municipal liability claim under § 1983 must fall as well. *Voyricky v. Village of Timberlake, Ohio*, 412 F.3d 669, 679 (6th Cir. 2005). Accordingly, summary judgment will be entered in favor of Officer Cook in his official capacity and the LFUCG on Simon's federal law claims.

D. THE COURT DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION OVER SIMON'S STATE LAW CLAIMS

Having concluded that summary judgment must be granted in the defendants' favor on Simon's federal claims, the Court's original jurisdiction has been extinguished. Pursuant to 28 U.S.C. § 13 67(c)(3), the Court may, *sua sponte*, decline to exercise supplemental jurisdiction over a pendant state-law claim if it has dismissed all claims over which it has original jurisdiction. *See Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992). "Residual jurisdiction should be exercised only in cases where the 'interests of judicial economy and the avoidance of [*14] multiplicity of litigation' outweigh our concern of 'needlessly deciding state law issues.' " *Moon v. Harrison Piping Supply*, ___ F.3d ___, 2006 WL 2772763 (6th Cir. September 28, 2006) (citing *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993)). In this case, there are no overwhelming issues of judicial economy which would weigh towards exercising jurisdiction.

As a result, the Court declines to exercise supplemental jurisdiction over the remaining state

law claims and will dismiss them without prejudice. 28 U.S.C. § 1367 (c) (3).

V. CONCLUSION

For the foregoing reasons, and the Court being fully and sufficiently advised, it is HEREBY ORDERED that:

(1) the defendants' motion for summary judgment [DE #76] is GRANTED, and the plaintiff's federal claims are DISMISSED WITH PREJUDICE and the plaintiff's state-law claims are DISMISSED WITHOUT PREJUDICE;

(2) the plaintiffs motion for summary judgment [DE #77] is DENIED; and

(3) the plaintiff's motion in limine [DE #73] is DENIED AS MOOT.

This the [7th] day of November, 2006.

/s/ KSF

KARL S. FORESTER, SENIOR JUDGE

APPENDIX E

Eastern District of Kentucky
FILED
OCT 24 2006
At Lexington
Leslie G Whitmer
Clerk U S District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-489-KSF

RONALD N. SIMON
PLAINTIFF
V.
J. COOK, *et al*
DEFENDANTS

ORDER

****

[Forester, U.S. District Court Judge.] This matter is before the Court on the plaintiff's *pro se* motion for partial summary judgment [DE #5 8]. The defendant having filed its response, this matter is now ripe for review.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Ronald Simon ("Simon") filed this action on October 29, 2004, pursuant to 42 U.S.C. §

1983, against the defendants, J. Cook, individually and in his official capacity as a police officer employed by the Lexington-Fayette Urban County Government, and the Lexington-Fayette Urban County Government (hereinafter "LFUCG"). This action arises out of an incident that occurred on October 31, 2003. Simon alleges that while another police officer was at his residence on the afternoon of October 31,2003 investigating Simon's complaint of being harassed by unnamed police officers, Officer Cook intervened and interjected himself into this investigation, questioned plaintiff, handcuffed plaintiff, searched and seized plaintiff, and ultimately transported him to Eastern Kentucky State Hospital for psychiatric evaluation where he was kept for 5 days, all in violation of Simon's constitutional rights. Simon asserts various state law claims, including claims for negligence, civil rights violations, intentional infliction of emotional distress, and negligent [*2] infliction of emotional distress.

II. SIMON'S MOTIONS FOR SUMMARY JUDGMENT

In support of his motion for partial summary judgment, Simon argues that the LFUCG is liable to Simon under 42 U.S.C. § 1983 because the Fourth Amendment to the United States Constitution requires that a police officer obtain a warrant or court order before compelling an individual to undergo a psychiatric evaluation. The applicable LFUCG Division of Police policy does not require a warrant or a court order before an officer may force an individual to undergo a psychiatric evaluation, which, according to Simon, is unconstitutional. As a

result, Simon argues that since Officer Cook was acting pursuant to the alleged unconstitutional policy when he seized and detained Simon on October 31, 2003, the LFUCG is liable under § 1983.

In support of his motion, Simon notes that the United States Supreme Court has not addressed when it is "reasonable" under the Fourth Amendment for a police officer to seize an individual for a psychiatric evaluation. Simon points to *Gooden v. Howard County, Maryland*, 954 F.2d 960, 968 (4th Cir. 1992) (en banc), in which the Fourth Circuit Court of Appeals noted the lack of clarity in the law governing psychological seizures. FN 1.

> FN 1. However, *Gooden* does not hold that a warrant or a court order is required; in fact, the Fourth Circuit Court of Appeals found that the officers in that case were protected by qualified immunity because probable cause existed at the time to believe the plaintiff was mentally ill and a potential threat to herself, even though it was later conceded that the officers made a mistake in that the plaintiff was not mentally ill and should not have been detained. *Id.* at 966-68.

In further support of his motion, Simon relies on *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993). At issue in *Garner* was the city police department's general order listing felonies for which it was permissible to use deadly force to apprehend a fleeing felon. The general [*3] order implemented a Tennessee statute which was later found to be in

violation of the Fourth Amendment's prohibition against unreasonable seizures. In finding the city retroactively liable under § 1983, the Sixth Circuit rejected the city's argument that it had no choice but to follow the statutory language. Instead, the court held that the city's general order could have required a more restrictive deadly force policy than did the state statute. *Id.* at 364-65. Simon contends that based on *Garner*, the LFUCG could have adopted a general order that requires additional protections such as a warrant or court order before seizing and detaining an individual for a psychiatric evaluation.

Finally, Simon argues that profound liberty and privacy interests are implicated in involuntary psychiatric evaluations, and as a result, a warrant or court order must be obtained before the officer can compel an individual to submit to a psychiatric evaluation. Simon rejects attempts by appellate courts to analogize an emergency seizure for psychiatric evaluations to a warrantless arrest for suspected criminal activity. According to Simon different public policy goals are at issue. For all these reasons, Simon asks the court to create a "bright-line rule" requiring a warrant or court order before a police officer can seize an individual and require a psychiatric evaluation.

III. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In response, the LFUCG relies on K.R.S. § 202A.041, which provides in pertinent part:

(1) Any peace officer who has reasonable grounds to believe that an individual is

> mentally ill and presents a danger or threat of danger to self, family, or others if not restrained shall take the individual into custody and transport the individual without unnecessary delay to a hospital or psychiatric facility designated by the cabinet for the purposes of an evaluation to be conducted by a qualified mental health professional. . . .

Neither this statute, nor the General Order of the Division of Police, 88-3/D, which effectuates the procedures set forth in this statute, require a warrant or court order to seize an individual for a [*4] psychiatric evaluation when the officer has probable cause to believe that the individual is mentally ill and dangerous. Based on this statute, and Sixth Circuit precedent including *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997), the LFUCG argues that there is no legal basis upon which the Court could grant Simon's motion for partial summary judgment.

IV. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

ajudgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Patton v. Bearden*, 8 F. 3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment, *Id.* at 343. "The mere existence [*5] of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

B. NO WARRANT OR COURT ORDER IS REQUIRED TO SEIZE AND DETAIN AN INDIVIDUAL UNDER K.R.S. 202A.041

The Sixth Circuit Court of Appeals has held that "in the context of a mental health seizure an officer must have probable cause to believe that the person seized poses a danger to himself or others." *Fisher v. Harden*, 398 F.3d 837, 842 (6th Cir. 2005) (relying on *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997)). In *Monday*, an officer responded to a radio dispatch that the plaintiff had telephoned a mental health worker and stated that he was upset over a divorce, had ingested some pills, and was drinking alcohol in an effort to commit suicide. The officer entered the home and found the plaintiff, who appeared intoxicated and depressed, drinking alcohol. The officer determined that at least twenty Xanax pills were missing. Under these circumstances, the court held that the officer "had probable cause to believe that [the] plaintiff was attempting to commit suicide, or at least might injure himself." *Id.* According to the Sixth Circuit in *Fisher*, "[a] showing of probable cause in the mental health seizure context requires only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior." *Fisher*, 398 F.3d at 843. Clearly, Sixth Circuit precedent does not require a law enforcement officer to obtain a warrant or court order prior to seizing an individual for a psychiatric evaluation, so long as probable cause of dangerous behavior exists. [*6]

Simon's attempt to impose a bright-line rule requiring a warrant or court order must fail. His argument based on public policy defies the

precedential case law set forth above. The Kentucky statute and the LFUCG policy at issue do not require a warrant or a court order, and there is no other legal basis for the Court to require a warrant or court order under these circumstances. Simon's reliance on *Garner* is unfounded inasmuch as there has been no finding that K.R.S. §202A.401 is unconstitutional. Accordingly, Simon's motion for partial summary judgment will be denied.

V. CONCLUSION

For the reasons set forth above, and the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that the plaintiffs motion for partial summary judgment [DE #58] is DENIED.

This [24th] day of October, 2006.

/s/ KSF

KARL S. FORESTER, SENIOR JUDGE

APPENDIX F

Eastern District of Kentucky
FILED
OCT 23 2006
At Lexington
Leslie G Whitmer
Clerk U S District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-489-KSF

RONALD N. SIMON
PLAINTIFF
V.
J. COOK AND LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT
DEFENDANT

OPINION AND ORDER

****

[Forester, U.S. District Court Judge] This matter is before the Court upon the plaintiff's motions to review by the district court judge the Memorandum Opinion and Order entered by the magistrate judge on December 16, 2005. [DE #54 and DE #64] The defendants having responded, and

the plaintiff having filed his reply, this matter is now ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Ronald N. Simon ("Simon") filed this action on October 29, 2004, pursuant to 42 U.S.C. § 1983 against the defendants, J. Cook, individually and in his official capacity as a police-officer employed by the Lexington-Fayette Urban County Government, and the Lexington-Fayette Urban County Government. This action arises out of an incident that occurred on October 31, 2003. Simon alleges that while another police officer was at his residence on the afternoon of October 31, 2003 investigating Simon's complaint of being harassed by unnamed police officers, defendant police officer J. Cook intervened and interjected himself into this investigation, questioned plaintiff, handcuffed plaintiff, searched and seized plaintiff, and ultimately transported him to Eastern [*2] Kentucky State Hospital for psychiatric evaluation where he was kept for 5 days, all in violation of Simon's constitutional rights. Simon asserts various state law claims, including claims for negligence, civil rights violations, intentional infliction of emotional distress, and negligent infliction of emotional distress.

On October 13, 2005, the Court entered its Dispositive Motions Scheduling Order which established deadlines for pretrial discovery and the filing of dispositive motions and referred all discovery disputes, including a pending motion for protective order filed by Simon, to the Magistrate Judge for resolution. [DE #27] Thereafter, on

November 10, 2005, Simon filed his motion for a protective order limiting the scope of the defendants' discovery. [DE #33] In his motion, Simon argued that the defendants sought information that (1) is beyond the scope of Rule 26(b)(1) of the Federal Rules of Civil Procedure, (2) intended to cause annoyance, embarrassment and oppression, and (3) subject to the psychotherapist-patient privilege and the constitutional right to privacy. As a result, Simon's motion for protective order requested that discovery be limited to the following matters: (1) information regarding witnesses to be called at trial, (2) information regarding the facts and circumstances of which defendant Cook was aware at the time he seized Simon on October 31, 2003, and (3) information regarding damages. Additionally, Simon requested the Court to prohibit the defendants from obtaining any discovery into the following matters: (1) any of his medical records, including records of his psychiatric evaluation at Eastern State Hospital; (2) the names of his health care providers, the dates of treatment, and the nature of treatment; (3) any "other acts," as defined under Federal Rule of Evidence 404, which are probative only of his character; (4) his mental condition; (5) his personal finances; (6) his sexual habits; (7) his relationships with family, neighbors and friends; (8) his religious beliefs; and (9) any other irrelevant private matters. [*3]

The defendants objected to Simon's motion for a protective order, and also filed a motion to compel Simon to supplement his responses to two of their discovery requests and to compel Simon to make himself available for deposition. [DE #36] In support of their position, the defendants argue that based on

the allegations in the complaint, Simon has put his mental state into issue and that Simon's emotional/psychiatric history prior to October 31, 2003 may lead to the discovery of relevant, admissible evidence concerning the defenses asserted to the complaint. The defendants also argue that since Simon has put his mental state into issue, he has waived any psychiatric/patient privilege, and therefore, the defendants are entitled to discover the report of Simon's psychiatric evaluation conducted at Eastern State Hospital after Simon was transported there by defendant Officer Cook on October 31, 2003.

The Magistrate Judge reviewed Simon's motion for a protective order and the defendants' motion to compel, and determined that based on the pleadings, Simon has placed his mental state at issue and thereby waived any psychiatric/patient privilege. Accordingly, the Magistrate Judge concluded that the defendants are entitled to obtain discovery from Simon concerning his mental state on October 31, 2003, which includes their entitlement to the report of Simon's psychiatric evaluation at Eastern Kentucky State Hospital conducted subsequent to this incident on October 31, 2003. Additionally, the Magistrate Judge concluded that the defendants are entitled to discovery of evidence relevant to the defendants' defenses. Finally, the Magistrate Judge ordered that any and all of Simon's medical records are confidential information and should be disclosed only to defendants and their counsel, and if filed in the record, must be filed under seal. [DE #42]

On December 22, 2005, Simon filed a pleading entitled "Objection," in which he complains that he only has a matter of days to respond to the defendants' discovery responses and argues that [*4]

he has not waived his psychotherapist-patient privilege. [DE #46] A certificate of service filed on March 16, 2006 and a review of the record reveal that Simon's Objection was not served on the defendants on the date it was filed, December 22, 2005, but rather March 16, 2006. [DE #53] Simon's Objection to the Magistrate Judge's order did not reference any rule or statute, or set forth any basis upon which the Court could find the ruling was clearly erroneous or contrary to law as required by Rule 72(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(A). Additionally, Simon did not seek an extension of time in which to file an objection.

Nearly three months later, on March 17, 2006, Simon filed his motion to review the Magistrate Judge's Memorandum Opinion and Order of December 16, 2005. FN 1. [DE # 54]

> FN 1. On April 10, 2006, Simon filed a Motion to Amend Plaintiff's Erroneously-Styled Motion to Reconsider, requesting that the caption be replaced with Motion to Review by the District Court Judge. [DE #63] On April 14, 2006, Simon filed a new Motion for Review by District Court Judge, incorporating the arguments and analysis from his earlier motion. [DE #64] On April 17, 2006, the magistrate judge entered his order granting Simon's motion to amend, and striking the original "Motion for Reconsideration" caption and replacing

> it with "Motion to Review by District Court Judge." [DE #65]

Simon continued to argue that the psychotherapist-patient privilege has not been waived and that the defendants should be precluded from discovering information protected by the privilege and the right to privacy under the United States Constitution.

II. ANALYSIS

Under the authority of 28 U.S.C. § 636(b) (1) (A), a district court "may designate a magistrate to hear and determine any pretrial matter pending before the court," with certain exceptions not relevant to this matter. When a magistrate judge determines a non-excepted, pending pretrial matter, the district court has the authority to "reconsider" the determination, but under a limited standard of review. 28 U.S.C. § 636(b)(1)(A). Specifically, the magistrate judge's determination may be [*5] overturned by the district court only if it is "clearly erroneous or contrary to law." *Id.* In addition, Rule 72(a) of the Federal Rules of Civil Procedure governs referral of nondispositive matters to the magistrate judge. It provides:

> A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10

> days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

Fed.R.Civ.P. 72(a).

The Magistrate Judge's Memorandum Opinion and Order was entered on December 16, 2005. On December 22, 2005, Simon filed his pleading entitled Objection, in which he generally objects, without citation to any authority, to the Magistrate Judge's finding that he had waived his psychotherapist-patient privilege. [DE #46] This pleading was not served on the defendants until March 16, 2003. [DE #53]. The next day, Simon filed his Motion to Reconsider the Magistrate Judge's Memorandum Opinion and Order. [DE #54]

Under both the clear terms of 28 U.S.C. §636(b)(1)(A) and Rule 72(a), Simon was required to **serve** and file his Objections within 10 days of service of the order. He clearly violated this requirement. Although Simon is acting *pro se* in this matter, by his own admission he is a graduate of Duke University School of Law, and passed both the District of Columbia and Kentucky bar examinations. [DE #59, Ex A] Nevertheless, the Court will conduct a *de novo* review of the Magistrate

Judge's determination that Simon has waived his psychotherapist-patient privilege.

The Supreme Court has recognized the psychotherapist-patient privilege in federal question [*6] cases, see *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), but has not addressed whether the privilege is waived by a plaintiff who places his or her medical condition at issue. However, since *Jaffee* numerous courts have concluded that, similar to the attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue. *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D.Pa 1997); *Vann v, Lone Star Steakhouse & Saloon, Inc.*, 967 F.Supp. 346, 349-50 (C.D. Ill. 1997); *EEOC v. Danka Indus., Inc.*, 990 F.Supp. 1138, 1142 (E.D. Mo. 1997); *Kirchner v. Mitsui & Co. (U.S.A.), Inc.*, 184 F.R.D. 124, 127-28 (M.D. Tenn. 1998); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 (D.N.J. 2000).

A review of the relevant pleadings reveals that Simon has clearly placed his medical and emotional condition at issue in this case. Simon claims that Officer John Cook did not have probable cause to transport him to Eastern Kentucky State Hospital on October 31, 2003, for a psychiatric evaluation, pursuant to statute. The defendants, on the other hand, contend that Officer Cook acted in good faith, with probable cause, and pursuant to statutory authority. Certainly, resolution of this issue revolves around Simon's physical and mental state on and around October 31, 2003. For this reason, Simon has waived his psychotherapist-patient privilege;

therefore, the Magistrate Judge's Memorandum Opinion and Order of December 16, 2005 is not clearly erroneous or contrary to law. [*7]

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED that:

(1) Simon's Objections [DE # 46] are OVERRULED;

(2) Simon's Motion for Review by District Court Judge [DE # 541 and Motion for Review by District Court Judge [DE #64] are DENIED; and

(3) the Magistrate Judge's Memorandum Opinion and Order [DE #42] is ADOPTED as and for the opinion of the Court.

This the [23rd] day of October, 2006.

/s/ KSF

KARL S. FORESTER, SENIOR JUDGE

APPENDIX G

Eastern District of Kentucky
FILED
DEC 16 2005
At Lexington
Leslie G Whitmer
Clerk U S District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO 04-489-KSF

RONALD N. SIMON,
PLAINTIFF
V.
J. COOK, ET AL.,
DEFENDANTS

MEMORANDUM OPINION AND ORDER

****

[TODD, U.S. MAGISTRATE JUDGE.]

I. INTRODUCTION

On October 29, 2004, plaintiff Ronald N. Simon filed this *pro se* action, pursuant to 42 U.S.C. § 1983, against defendants J. Cook, individually and in his official capacity as a police officer employed by

the Lexington Fayette Urban County Government, and the Lexington Fayette Urban County Government, concerning an incident that occurred on October 31, 2003. Plaintiff alleges that while another police officer was at his residence on the afternoon of October 31, 2003, investigating plaintiff's complaint of being harassed by unnamed police officers, defendant police officer J. Cook intervened and interjected himself into this investigation, questioned plaintiff, ultimately handcuffed, searched and seized plaintiff, and then transported him to Eastern Kentucky State Hospital for a psychiatric evaluation, where he was kept for five (5) days, all in violation of plaintiff's constitutional rights. Plaintiff also asserts various state law claims, including claims for negligence, civil rights violations, intentional infliction of emotional distress, and negligent infliction of emotional distress.

This matter is before the court on plaintiff's motion for a protective order limiting the scope of defendants' discovery and on defendants' motion to compel discovery from plaintiff. FN 1. These motions have been fully briefed and are ripe for review. [*2]

> FN 1. Pursuant to numerical paragraph 6 of the district court's Dispositive Motions Scheduling Order entered herein on October 13, 2005, all discovery disputes were referred to the Magistrate Judge for resolution. [DE #27].

The resolution of the discovery dispute concerning the foregoing motions requires the court to examine the disputed discovery requests, as well as any correspondence between the parties in attempting to informally resolve this discovery problem without court intervention. In considering this matter, the Magistrate Judge is mindful of the scope of discovery permitted by Fed.R.Civ.P. 26, subsequent to the 2000 amendment thereto, which permits "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, . . ."

II. PLAINTIFF' S MOTION FOR A PROTECTIVE ORDER and DEFENDANTS' MOTION TO COMPEL DISCOVERY FROM PLAINTIFF

Plaintiff seeks a protective order limiting the scope of defendants' discovery. As grounds for his motion for a protective order, plaintiff asserts that defendants seek information that is (1) beyond the scope of Rule 26(b)(l), (2) intended to cause annoyance, embarrassment and oppression, and (3) subject to the psychotherapist-patient privilege and the constitutional right to privacy. Plaintiff requests that the scope of defendants' discovery be limited to the following matters: (1) information regarding witnesses to be called for trial, (2) information regarding the facts and circumstances of which defendant Cook was aware at the time he seized plaintiff on October 31, 2003, and (3) information regarding damages.

More particularly, plaintiff also requests the court to prohibit defendants from obtaining any

discovery into the following matters: (1) any of plaintiff's medical records, including records of his psychiatric evaluation at Eastern State Hospital; (2) the names of plaintiff's health care providers, the dates of treatment, and the nature of treatment; (3) any "other acts," as defined under Federal Rule of Evidence 404, which are probative only of the character of the plaintiff; (4) plaintiff's mental condition; (5) plaintiff's personal finances; (6) plaintiff's sexual habits; (7) plaintiff's relationships with family, neighbors and friends; (8) plaintiff's religious beliefs; and (9) any other irrelevant private matters.

In response, defendants object to plaintiff's motion for a protective order and have also moved to compel plaintiff to supplement his responses to two of their discovery requests [*3] (Interrogatory No. 15 and Request No. 15 of the Request for Production of Documents) and to make himself available for deposition.

In support of their objection to plaintiff's motion for a protective order and their motion to compel, defendants note that based on the allegations made in the complaint, including plaintiff's multiple references to the emotional distress he suffered as the result of the actions of the defendants in this case, plaintiff has put his mental state at issue. Based on this fact, defendants submit that plaintiff's emotional/psychiatric history prior to October 31, 2003, may lead to the discovery of relevant, admissible evidence concerning the defenses asserted to the complaint. Defendants further argue that since plaintiff has placed his mental state at issue, he has waived the psychiatric/patient privilege; therefore, they are

entitled to discover the report of plaintiff's psychiatric evaluation conducted at Eastern Kentucky State Hospital after plaintiff was transported there by Officer John Cook on October 31, 2003.

Analysis

This case presents many factual issues in dispute. Plaintiff claims that Officer John Cook did not have probable cause to transport him to Eastern Kentucky State Hospital on October 31, 2003, for a psychiatric evaluation, pursuant to statute. On the other hand, defendants contend that Officer Cook acted in good faith, with probable cause, and pursuant to statutory authority. Thus, it is clear that based on the allegations made in the complaint, plaintiff has placed his mental state at issue. Consequently, plaintiff has waived the psychiatric/patient privilege. *See Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000). Therefore, the Magistrate Judge concludes that defendants are entitled to obtain discovery from plaintiff concerning his mental state on October 31, 2003, which would necessarily include their entitlement to the report of plaintiff's psychiatric evaluation at Eastern Kentucky State Hospital conducted subsequent to this incident on October 31, 2003. Additionally, the Magistrate Judge also concludes that defendants also [sic] entitled to discover plaintiff's [*4] discovery of evidence relevant to defendants' defenses raised herein. FN 2.

> FN 2. Although discoverable, such information may or may not be admissible at trial; however, the

admissibility of this information is not before the court at the present time.

However, any and all of plaintiff's medical records, including the report of his psychiatric evaluation, are confidential information and should be disclosed only to defendants and their counsel. Defendants are free to use this information when deposing plaintiff, but if any of plaintiff's medical records are filed in the record, they must be filed under seal.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs motion for a protective order limiting the scope of defendants' discovery concerning his mental state On October 31, 2003, and his emotional/psychiatric history prior to October 31, 2003 [DE #33] is DENIED.

2. Defendants' motion to compel plaintiff to supplement his responses to Interrogatory No. 15 and to Request No. 9 of the Request for Production of Documents and to make himself available for deposition [DE #36] is GRANTED.

3. Plaintiff is directed to supplement his responses to Interrogatory No. 15 and to Request No. 9 of the Request for Production of Documents within ten (10) days of the date of this Order.

This [16th] day of December, 2005.

/s/ James B. Todd

JAMES B. TODD
UNITED STATES MAGISTRATE JUDGE